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NO. 82-160

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1981

HORACE CLIFTON JONES,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

STEVEN HERSHEY SWANDER
PRICE & SWANDER
409 Sinclair Building
Fort Worth, Texas 76102
(817) 338-4633

ATTORNEYS FOR PETITIONER

July 13, 1982

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there was substantial evidence presented to prove Petitioner guilty as a causer of the interstate transportation of a stolen tractor by stating he was a potential buyer for the tractor.

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The Petitioner, HORACE CLIFTON JONES, also known as BUSTER JONES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 15, 1982.

OPINIONS OF COURTS BELOW

This case proceeded to trial in the United States District Court for the Northern District of Texas. No formal opinion was rendered by that Court. The written opinion of the United States Court of Appeals for the Fifth Circuit reported at 673 F2d 115 is contained in the Appendix to this Petition.

JURISDICTION

Petitioner seeks to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of conviction as to Count I of the Indictment charging causing of the interstate transportation of a stolen tractor entered on April 15, 1982. A timely Petition for Rehearing was denied by written order of the United States Court of Appeals for the Fifth Circuit on May 18, 1982. This Petition for Certiorari is sought pursuant to 28 U.S.C. 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

TITLE 18 SECTION 2(a) and (b)

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

TITLE 18 U.S.C. 2312

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

TITLE 18 U.S.C. 2313

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

In late November, 1979, CHUCK JORDAN stole a Massey Ferguson tractor in Oklahoma City, Oklahoma, and transported it to Fort Worth, Texas (Tr., Vol. 1, pp. 76-77). JORDAN had previously, in early November, purchased a pick-up truck from HORACE CLIFTON JONES (Tr., Vol. 1, pp. 76-77, Government's Exhibit 3). About the time of the purchase of the truck, JORDAN testified that he asked JONES if he would be interested in buying a tractor (Tr., Vol. 1, pp. 78, 154): "Well I asked him if he was interested in a tractor, and he said yes. And I said I had one located and I'd bring it down, and he said bring it down, that he'd buy it, sell it, or get rid of it." (Tr., Vol. 1, p. 78).

JORDAN testified that JONES furnished him a trailer which he used to haul the stolen tractor to Fort Worth, Texas (Tr., Vol. 1, pp. 79, 84, 154). Prior to hauling the stolen tractor to Fort Worth, JORDAN stated that he called JONES by telephone: "Well I called him and I told him that I had one located and I'll bring it down. He

said to bring it down." (Tr., Vol. 1, p. 83). JORDAN stated that the cash purchase price for the tractor was to be FIVE THOUSAND DOLLARS ($5,000.00) (Tr., Vol. 1, p. 84).

Finally, JORDAN related that the reason he stole the tractor and brought it to JONES' place of business in Fort Worth was because JONES indicated he might buy it (Tr., Vol. 1, p. 139).

The Statement of Facts reveals that the conversations between JORDAN and JONES were about the potential purchase of a tractor, not that JONES was told this was to be a stolen tractor. That JONES knew the tractor was to be stolen is only by implication. The language testified to by JORDAN does not indicate a fixed deal or promise on the part of JONES to purchase the tractor. Of course, at the time of the calls, JONES had not seen the tractor, and the inference that there was a promise to purchase the tractor for FIVE THOUSAND DOLLARS ($5,000.00) without seeing it is strained.

A complete statement of facts is given in the reported opinion of the United States Court of Appeals contained in the Appendix.

At this stage, Petitioner seeks relief only from the conviction of causing the interstate theft of a motor vehicle pursuant to 18 U.S.C. 2312, which statute provides part of the initial jurisdiction of the United States District Court for the Northern District of Texas.

REASONS FOR GRANTING THE WRIT

Petitioner has been convicted of inducing or causing the transportation of a stolen tractor in interstate commerce solely on the testimony of a five times previously convicted thief (Tr., Vol. 1, p. 74), who plead guilty as the principal in this case (Tr., Vol. 1, pp. 73-74, 81-82). This accomplice was described by the Court of Appeals as a "professional thief." United States v. Jones, 673 F2d 115, 118 (5th Cir. [1982]).

Petitioner's case presents a gross extension of the limits of 18 U.S.C. 2(b) covering the definition and proof of what constitutes a person a "causer" of a criminal act so as to hold one liable as a principal.

The circuit courts have required an actor to be a cause in fact with the requisite criminal intent to be liable under 18 U.S.C. 2(b). United States v. Ruffin, 613 F2d 408, 412 (2nd Cir. [1979]), United States v. Lester, 363 F2d 68, 73 (6th Cir. [1966]).

The Fifth Circuit holding that "The evidence is plainly sufficient to find beyond a reasonable doubt that JONES induced the accomplice to steal the vehicle in Oklahoma and transport it to JONES' place of business in Texas by promising in advance of the theft to buy the vehicle when the accomplice brought it to him in Texas," United States v. Jones, supra., 673 F2d at 117, is not consistent with the record or with the requirement that JONES be a causer in fact with criminal intent of the thief's actions.

Clearly, there is a limit to holding one liable for the acts of another when the other is a professional criminal with complete knowledge and control over what he is doing. While the usual application of 18 U.S.C. 2(b) is when the actor utilizes an "innocent agent" to perform the criminal act, it has been held that there is no requirement that the agent be innocent for the section to apply, United States v. Rapoport, 545 F2d 802, 806 (2nd Cir. [1976]), and that the guilt or innocence of the agent is irrelevant to the application to 18 U.S.C. 2(b), United States v. Ruffin, supra., 613 F2d at 413.

Still, there are logical limits to holding one liable as a causer without proven criminal intent when the perpetrator of the crime is in no sense innocent:

1. When the perpetrator of the crime (thief) is in control with knowledge of his actions, it is urged that his actions are in no real sense being caused by a person offering a potential benefit (purchase of property) of the crime. The thief would logically have committed the crime even without the offer or as soon as he found another potential buyer.

2. Assuming that a principal has knowingly agreed to purchase stolen property from his agent (thief), this is in legal contemplation a criminal conspiracy and the participants are not causing the others' actions, but agreeing to act together.

The Court of Appeals in this case has expanded the grasp of 18 U.S.C. 2(b) to include a potential buyer from a professional thief. Unquestionably, a person may be guilty of receiving stolen property with knowledge pursuant to 18 U.S.C. 2313. However, since a receiver is not going to be liable as a causer of the thief's actions, United States v. Beck, 615 F2d 441 (7th Cir. [1980]), United States v. Gallagher, 565 F2d 981 (7th Cir. [1977]), it seems patently unjust to hold a potential receiver liable as a causer and without allegation and proof of conspiracy.

It is undoubtedly important that parameters of criminal conduct be definitely stated, and this Court should exercise its supervisory authority to limit the unbridled use of 18 U.S.C. 2(b) to prevent abuse by the Government through expanded prosecution of "causers" for persons who are outside the scope of criminal laws relating to their specific conduct. Petitioner has fallen victim to such abuse.

Petitioner recognizes that JORDAN (the thief) testified that JONES furnished him with a trailer to help transport the tractor. JORDAN'S testimony was thought to be fabricated by the Court of Appeals, United States v. Jones, supra., 673 F2d at 121, and it did not hold JONES liable as a knowing aider pursuant to 18 U.S.C. 2(a). The conviction of JONES in Count I of the Indictment for causing the interstate transportation of a stolen vehicle was based solely on the uncorroborated and

unreliable testimony of CHUCK JORDAN, the accomplice thief. The unreliability and lack of corroboration as to the elements of the offense charged are detailed in the opinion of the Court of Appeals.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

PRICE & SWANDER

By Steven Hershey Swander
STEVEN HERSHEY SWANDER

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CERTIFICATE OF SERVICE

I, STEVEN HERSHEY SWANDER, do hereby certify that on this the 13th day of July, 1982, I served a copy of the foregoing Petition for Writ of Certiorari on:

Solicitor General
Department of Justice
Washington, D.C. 20530

by mailing same by certified mail, postage prepaid, to such attorney at the above address.

SIGNED at Fort Worth, Texas, on this the 13th day of July, 1982.

Steven Hershey Swander

STEVEN HERSHEY SWANDER